SOAH DOCKET NO. 582-14-2123
TCEQ DOCKET NO. 2014-0124-WR

APPLICATION OF THE LOWER COLORADO RIVER AUTHORITY FOR EMERGENCY AUTHORIZATION	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

COLORADO WATER ISSUES COMMITTEE'S
EXCEPTIONS TO THE ALJs' PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

NOW COMES the Colorado Water Issues Committee ("CWIC") of the Texas Rice Producers Legislative Group and submits its Exceptions to the ALJs' Proposal for Decision and respectfully shows the following.

SUMMARY OF POSITION

No Party disagreed that drought circumstances warrant an emergency amendment of the 2010 Water Management Plan, and the Proposal for Decision acknowledges that.[1] CWIC did *not* object to totally suspending the supply of water that is obligated for the 2014 irrigation season. It did not dispute necessary findings that support action to protect human health and safety from imminent risk. CWIC *did* object that the Executive Director's emergency order overreaches by assuming scenarios that are incredibly unlikely, as well as unnecessary. Going beyond what is necessary to address an imminent risk abuses the Commission's emergency authority within § 11.139, and any other relevant agency authority.[2]

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[1] The PFD refers to the Administrative Law Judges by the acronym "ALJs," and that acronym is used respectfully in these exceptions as well. These exceptions refer to the Proposal for Decision as the "PFD," and to the ALJs' Proposed Order as the "Proposed Order." They refer to the 2010 Water Management Plan as the 2010 "WMP". References to the "Water Code" are to TEX. WATER CODE (www.statutes.legis.state.tx.us).

[2] See, e.g., *CenterPoint Energy Entex v. R.R. Comm'n of Tex.*, 208 S.W.3d 608, 615–16 (Tex. App.—Austin 2006, pet. dism'd) (stating that an agency may not "contravene specific statutory language, run counter to the general objectives of the statute, or impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions" and citing *City of Austin v. Southwestern Bell Tel. Co.*, 92 S.W.3d 434, 441 (Tex. 2002)); *State v. Public Util. Comm'n*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied); *Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W. 3rd 368, 377 (Tex. 2005); City *of Corpus Christi v. Public Util. Comm'n*, 188 S.W.3d 681 (Tex. App.–Austin 2005, pet. denied).

The ALJ's Proposed Order amplifies the error in the Executive Director's order, but is not more effective to protect human health and safety. The crux of the ALJs' proposal to go to a 1.4 million acre-feet trigger is their determination that the 1.1 million acre-feet trigger proposed by LCRA is insufficiently protective of public health and safety. (PFD, p. 19). However, there is *no* evidence that a 1.1 million acre-feet trigger level will result in anything other than *total* curtailment (or "cut-off") throughout the time that the Order is effective. What does 1.4 million *accomplish* that 1.1 does *not* accomplish or that is not accomplished by ordering a cut-off but deferring further consideration of trigger levels to full proceedings on the pending water management plan revision? If the answers to those questions lie outside the effective term of the order (as does the predicate for both the 1.1 and 1.4 million triggers), and doesn't require any additional action during the term of the order (in total cut-off there is nothing more to cut), then the ALJs' proposal should be rejected.

LCRA's application seeks emergency amendment of Water Rights Permit No. 5838 (the 2010 WMP) to increase the triggers for cutting off interruptible supplies at a specified 1.1 million acre-feet, and CWIC disagrees that the order may exceed the amendment requested.[3] It is not the rules or practice of this agency in water rights matters to exceed an application (although an applicant can be granted less than requested), or to create greater penalties for those who come forward to advocate that less be granted. That goes against the rights of the applicant and the protestant and such regulatory disincentives should be avoided for policy reasons as well. That an emergency amendment is confined to the term of a limited order does not make it less a water rights amendment. Limited and expedited emergency proceedings present the worst example of the dangers rather than any reason to be less principled or cautious.[4] In the absence of any precedent for emergency hearings on water rights matters under § 11.139, it begs the question of whether or not protestants in other TCEQ emergency matters, perhaps an emergency matter involving the disposal of waste, are subject to the amount of waste disposed increasing from that requested.

In this proceeding, 1.4 million acre-feet was discussed in public comment but no one requested a hearing on that number. At least LCRA's extensive application to support an increase to 1.1 million acre-feet has been a part of the agency's record for a number of months, and its computer models were made available some time ago. Parties proposing 1.4 million objected to even being asked to provide their exhibits prior to trial because they needed more time to prepare them. Their exhibits, offered on highly complex issues and with different model analyses, were circulated in large stacks as the hearing on the merits

[3] The application also brackets partial curtailment criteria.

[4] Other arguments on this issue are presented in CWIC's Brief Regarding Limitations of Application and Notice.

began. Their evidence is relevant to demonstrate their position that LCRA's proposed trigger should not be lowered, but it is not a basis for going outside the application. In this case, those parties' interest in the water permit being amended are only such as they have by contract with LCRA. Section 11.139 is not a vehicle for third parties to see, an amendment to LCRA's water rights in order to force LCRA to provide them more water. Their remedy against LCRA is contractual, if it exists at all.

CWIC also objected that the Executive Director's order had the effect of abandoning the 2010 WMP before revisions to it are considered in separate proceedings with full participation of the parties. There is no cap on irrigation supply implemented in the 2010 WMP that is not tied to some specific bracket of water shortage, for example. The Executive Director's order placed a limit on total irrigation water even when the lakes are brim full. The PFD does that as well, and goes so far beyond the 2010 WMP as to make findings regarding how to interpret the adjudication, LCRA's water rights, and its firm contracts. It is undisputed that the 2010 WMP obligates LCRA to provide interruptible stored water and relaxing that obligation is the only matter before the Judges.[5]It presents a policy decision for the TCEQ – proceeding under its emergency authority and truncated processes, will the agency go beyond what is necessary to address imminent risks or will it go further to essentially rewrite the conditions of existing water permits for effect beyond the time limits of the emergency order?[6]

CWIC proposes a resolution that fully addresses imminent risk to human health and safety, satisfies the irrigators' concerns about overreaching in this proceeding, and also accomplishes the agency's appropriate purposes. The components of that resolution are straightforward: (1) find as fact what is the real combined storage level as of (or near) the date of hearing; (2) find as fact that the lakes will not recover by March 1, 2014; and (3) find that under these circumstances, following the 2010 WMP to supply interruptible stored water during the term of this order would result in unacceptable risk to human health and safety and would almost certainly result in interruptible supplies being curtailed during the irrigation season.[7] Under an order that is modified for these findings, there would be no interruptible stored water for downstream irrigation so long as the order is in effect. CWIC's resolution is a feasible and practicable alternative to the ALJ's proposal, accomplishing every legitimate purpose of an emergency order.

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[5] See, undisputed Findings of Fact No. 12 that outside a DWDR, LCRA is obligated by the 2010 WMP to provide interruptible water.

[6] There is no room for argument that the downstream irrigators have a *right* to water under the 2010 WMP; otherwise, LCRA wouldn't be before the TCEQ to amend it.

[7] As read into the record as part of CWIC's closing argument, Transcript Page 570: 1-18. CWIC's other arguments were preserved in the alternative that curtailment triggers were included in the order.

As discussed below in more detail, the ALJs misunderstand that CWIC did not propose to *eliminate* other necessary findings regarding current drought circumstances, human health and safety, imminent risk or alternatives, for example, but merely to work the more neutral findings regarding curtailment trigger levels into the Executive Director's order. CWIC did not dispute many of those supporting findings in preliminary hearing, and would not have been at liberty to dispute them later during trial in any event. For CWIC's "no trigger" alternative to be consistent with the rest of the order, only *two* finding of facts in the Executive Director's order would need to be modified to a neutral position on projected curtailment levels. A few other conforming changes would be appropriate, and some would be necessary to consistently modify the ordering provisions.[8]

Even with total curtailment of interruptible supplies for three consecutive years, it is clear that the lake interests must look at the prospect of continued low inflows squarely in the eye for some time. CWIC applauds the City of Austin on making great strides toward conservation already. Austin's success does not diminish the fact that the *agency* should order reasonable demand reductions as a condition of emergency relief. That is consistent with the terms of the 2010 WMP, under which interruptible cut-offs and firm customer conservation go hand in hand in response to extreme drought. It also is consistent with the TCEQ's emergency relief in the Brazos River basin. The PFD suggests that implementation of the first phase of LCRA's TCEQ-approved firm customer curtailment plan is more onerous than it really is, considering that customers get credit for the savings that they have already achieved and LCRA has the power to grant variances to the letter of the plan to address particular circumstances, including for power companies.[9]

CWIC's simplified (not "minimized") resolution of this matter is the only resolution that the evidence supports without speculation about what weather conditions and lake levels may be a year or more from now, well outside the time limits of the Order. It is the only resolution that is not predicated on facts regarding near-term inflows that undisputed evidence establishes will not occur. It furthers the commonality of the Parties' positions – that under prevailing circumstances, the supply of interruptible stored water should be curtailed for the 2014 crop – but preserves the longer-term issues for the appropriate proceeding. The Parties are, after all, the same stakeholders that participated in developing the 2010 WMP as well as the proposed water management plan revision that remains

[8] Some misunderstanding of CWIC's proposed resolution is understandable. The proposal was read into the record possibly after midnight and CWIC's request to provide it in writing within the day as a supplement to its other proposed findings was denied by the Judges.

[9] LCRA's Exhibit 7, p. 38 (Affidavit of Nora Mullarkey Miller).

pending before the agency. Mr. Meszaros, testifying on behalf of the City of Austin, said he could accept such an order.[10]

CWIC's specific exceptions to the PFD are discussed below. The Commission should note additionally, however, that proceedings on this matter raise serious, broad concerns about the agency's policy for emergency suspension of water rights and other uses. The Executive Director's technical memorandum asserts that human health and safety is for case-by-case consideration and a risk doesn't even need to be more likely than not to be "imminent."[11]

The standards that have so far been applied to decisions in this matter also would call upon agriculture and industry generally, and without regard to property rights, to guarantee municipal uses against long-term inadequacies in infrastructure. The standards applied are not limited to interruptible customers. Non-essential municipal uses could even be called upon to protect lake levels above the intakes of other municipal users, at least up to the point where all suffer human health and safety impacts. If the state is entering upon a policy that limits full beneficial use of reservoir supplies based on chronically limited infrastructure, it calls water supply planning into question statewide. For specific risks in the Colorado River Basin, and given LCRA's predictions about continued drought, the concerns of the firm customers that are most exposed merit an agency-ordered evaluation of infrastructure plans. CWIC does not address these concerns further, but merely calls them to the Commissioners' attention.

EXCEPTIONS

1. CWIC Takes Exception to PFD, Page 3. The ALJs are correct that CWIC advocated an alternative 850,000 acre-feet trigger level during this proceeding but they fail to explain *why*. CWIC did not object to total curtailment of interruptible supplies for the 2014 crop. CWIC objected to using uncertain standards and emergency proceedings to essentially abandon or rewrite the 2010 WMP. LCRA had explained the intent of its application clearly enough that "[r]egardless of combined storage content on March 1, 2014, the requested Emergency Order would never have LCRA revert to the 2010 WMP." (Application, Page 4).

[10] Transcript, Page 280, Lines 7-12, Mr. Meszaros on cross-examination: "Well, if you're proposing an order that there is no trigger and it just simply states there's no ag releases, I think we could accept an order that has no trigger and says there's absolutely no ag releases."

[11] ED's Brief on Legal Issues Raised by CWIC, pp.3-4; See Testimony of Dr. Kathy Alexander; Tr. 457; 20-24.

CWIC advocated repeating the terms of previous orders considering that: an 850,000 trigger level would result in total cut-off; such a trigger level nevertheless could be calculated consistently with the principles of the 2010 WMP related to curtailment during the irrigation season (as opposed to fabricating a date well beyond the end of irrigation as a starting point from which to work backwards); it was the number the TCEQ Executive Director and the Commission itself had ordered three times before without formal objection from any party; and it recognized the step of reverting to the 2010 WMP at the end of the emergency relief.

2. CWIC Takes Exception to ALJs Finding of Fact No. 49c.

CWIC takes this finding out of sequence because it is short and it exemplifies the extreme difficulty inherent in taking up complicated and highly technical evidence in such a limited proceeding. This is a difficulty that the Parties and the ALJs have shared, and CWIC's exceptions are offered with due respect.

Finding of Fact No. 49c states that: "An interruptible stored water curtailment trigger should be set to avert, rather than create, conditions that could require declaration of a DWDR."

The general setting of interruptible stored water curtailment triggers clearly is a matter for consideration in the pending application to revise the 2010 WMP, and this order should not be a vehicle to offer instructions for that proceeding. Also, *each* of the trigger levels under discussion in this matter *will* result in total curtailment of interruptible supplies and *none will* create a condition that actually requires declaration of a DWDR. If a DWDR is declared nevertheless, it would not be because of interruptible supplies of water under an insufficient trigger level. And, *each* of the trigger levels have been analyzed with a hypothetical component regarding the earliest time that a DWDR might be declared, so the admonition in Finding of Fact No. 49c falls flat. A 1.1 million trigger level assumes no DWDR before the end of first crop irrigation *in year 2015*, and 1.4 assumes no DWDR *before the end of 2015*. (See Finding of Fact No. 45a). Both of those baselines are well beyond the term of this order. A calculation of reservoir yield is not dissimilar, as it assumes a demand level that maximizes beneficial use up until a point of shortage. In the case of firm yield, assumed use targets reaching depletion of supply just as the lakes begin to refill after the hydrologic drought of record.

At best, Finding of Fact No. 49c is further support for CWIC's proposal to enter an emergency order that does not depend on hypothetical curtailment triggers that cannot occur anyway. This approach better preserves the issues of projecting supply for consideration in the appropriate proceeding.

3. CWIC Takes Exception to PFD Pages 33-34. The ALJs provide only two reasons for not recommending CWIC's proposal to eliminate trigger levels from the ordering provisions, and neither of those reasons is supportable. The first reason is a circular argument that fails to explain *why* a trigger level should be required on emergency relief. The second reason was introduced above. The ALJs *misunderstood* how the proposed findings could be integrated into an order. Aside from the ordering provisions themselves, and if the TCEQ declined to also include conservation conditions, all of the Executive Director's findings and conclusions would remain intact except as follows, with marked changes:

   Modify ED Finding of Fact No. 49: "The emergency relief LCRA obtained in 2013 with an emergency order ~~setting~~ set forth a trigger of 850,000 AF. ~~is not a reasonable alternative at this time because of the prolonged nature and persistence of the drought and the fact that the lakes have not recovered from this drought.~~ If combined storage of the lakes recovers to 850,000 AF on March 1 and severe drought conditions return, combined storage could fall to 600,000 AF by the end of the first crop irrigation system, requiring declaration of a DWDR."

   Modify ED Finding of Fact No. 51: LCRA's requested curtailment approach for 2014 is more restrictive than the curtailment triggers in emergency orders issued by the Commission in 2012 and 2013. The 850,000 AF trigger in effect in 2012 and 2013 was based on avoiding the potential for dropping below 600,000 AF during the first crop of the season. Under LCRA's current approach, before the releases for interruptible water users are made, LCRA requests a combined storage trigger increase to a level that puts off the possibility of storage falling below 600,000 AF until spring of 2015. LCRA's analyses showed that if the interruptible stored water curtailment trigger is set at 1.4 million AF, combined storage in Lakes Travis and Buchanan does not fall to 600,000 AF before the end of 2015. [The underlined language is verbatim of the ALJ's proposed Finding of Fact No. 45a.]

   New Proposed Finding: "On February 1, 2014, the combined storage of Lakes Buchanan and Travis was 764,000 AF or 38% full. The Lakes are not expected to recover to any of the analyzed trigger levels before March 1, 2014. Under these circumstances, following the 2010 WMP to supply interruptible stored water during the term of this order would result in unacceptable risk to human health and safety and would almost certainly result in interruptible supplies being curtailed during the irrigation season."

[The referenced lake level comes from the ALJ's proposed Finding of Fact No. 13.]

Modify or Omit ED Finding of Fact No. 53: This finding only iterates LCRA's requested relief in order to then grant it.

A few of the ALJs modifications to the Executive Director's order would remain appropriate, specifically LCRA's updates to findings regarding inflow and lake levels; proposed Finding of Fact No. 46 regarding supply under certain temporary permits; the finding and ordering provision addressing environmental flows; proposed Conclusion of Law No. 8 and related findings that refer to contractual issues between LCRA and Garwood; and procedural findings.[12] An appropriate ordering provision would be that:

> "LCRA may deviate from the 2010 WMP as it pertains to the determination of interruptible supply for 20014 and instead provide no interruptible stored water within the LCRA Gulf Coast and Lakeside Divisions and Pierce Ranch based on the combined storage of Lake Buchanan on February 1, 2014, and the expectation that the lakes will not recover significantly before March 1, 2014, at 11:59 p.m."

CWIC urges that the Executive Director's order, with these modifications, be adopted in lieu of the ALJs Proposed Order. It is somewhat more difficult to make the ALJ's proposed order more neutral with regard to proposing one trigger level over because of the many other issues inherent in an order that was put together with such haste, but certainly possible.[13] There are some meritorious new findings that can be justified, if the other issues in these Exceptions are addressed. **In the alternative, CWIC urges the Commission to make modifications to the ALJs' Proposed Order similarly to those described above, and to use the same Ordering Provision, proposed above.**

4. CWIC Takes Exception to PFD, Pages 20-21. On these pages, the PFD dismisses CWIC's issue with the irrationality of assuming high *inflows* followed by immediate and precipitous reductions to extremely low *inflows*. The Judges incorrectly compare an increase in combined *storage* between January and May followed by a decline in combined *storage* over the summer months as its basis. CWIC's point, however, has to do with the finer issues of LCRA's stochastic modeling. Modeling in support of this application provided by the LCRA included the results for 2,000 simulations of potential futures. Of these 2,000 simulations, three predicted storage above 850,000 on

[12] For reasons discussed below, no automatic extension should be granted.

[13] Modification of the ALJs' Proposed Order to a more neutral position on trigger levels would require changes to the following provisions: the first sentence of Finding of Fact No. 30a, Finding of Fact No. 30b, the first sentence of Finding of Fact No. 49, the first sentence of Finding of Fact No. 49b, Finding of Fact No. 50, and the Ordering Provision.

March 1 or a 0.2% chance. One of these three predicted storage of greater than 1.4 million on March 1 or a 0.1% chance. Given the model's level of accuracy, this likelihood is not different from 0% chance. Of these three events, none predicted that storage would then drop to less than 600,000 acre-feet for the remainder of the simulation, which is five years. Therefore, it was analysis and results produced by the applicant (LCRA) that provides the basis of CWIC's finding that the likelihood of rise to 850,000, and then a fall to below 600,000, is essentially zero. This finding is consistent with LCRA's meteorologist's testimony regarding the short term weather forecast and LCRA's hydrologist's deference to this forecast.

5. CWIC Takes Exception to ALJs Finding of Fact No. 2. In this finding, the ALJs make a change to one of the undisputed Executive Director findings, presumably because they believe that there is a substantive difference between the 2010 WMP being "required" by LCRA's water rights (as the Executive Director ordered) and the 2010 WMP being "a part" of LCRA's water rights (as LCRA now proposes it). It is procedurally inappropriate to change a substantively significant and undisputed finding at this late date, and the parties have not had an adequate opportunity to join the issue. To determine whether or not the change does make the finding more accurate would require a significant degree of background research into the adjudication documents as well as interpreting the legal implications of special conditions in water rights. **The ALJ's change to Finding of Fact No. 2 should be rejected.**

6. CWIC Takes Exception to ALJs Finding of Fact No. 8. CWIC proposed an addition to this finding in the Executive Director's order to make representation of the 2010 WMP curtailment trigger levels more complete, not different. Specifically, the 2010 WMP plainly specifies that, outside a DWDR, the cut-off trigger for stored interruptible water is 325,000 acre-feet combined storage.[14] CWIC does not understand why the ALJs would consider the cut-off trigger that actually applies now (when there is no DWDR declaration) to be *less* relevant to the proceeding than a cut-off trigger that would apply if a future condition would occur (specifically, the future declaration of a DWDR). They are equally relevant.

   The proposal for decision is replete with similar disregard of CWIC's issues. For example, CWIC proposed the following modification to ED Finding of Fact No. 32, which the PFD describes as contrary to the preponderant evidence:

   > "As lake levels drop, some retail water suppliers are unable to pump water from the lakes in the manner in which they are accustomed. This causes wholesale raw water customers to either move intakes to reach the water, or obtain

[14] 2010 WMP (Attachment E to LCRA's Application to Amend the WMP), Page P-6.

alternate sources. Smaller systems will likely have to haul water from a water utility with a viable source. If the lake levels drop more quickly than arrangements for alternative intakes or supplies can be implemented, LCRA water systems and its customers' water systems will have difficulty in meeting firm customers' water needs."

If these changes are contrary to the preponderant evidence, then the ALJs must disregard the fact that municipal water supply continues to be pumped from the lakes by some retailers as lake levels drop now.

In another example, the ALJs decline modifications to Finding of Fact 29, to make that finding more correct with regard to whether it is necessarily true that crops would be ruined. There is uncontroverted testimony in the record that the timing of total cut-off during the irrigation season matters to that result and that the availability of some supplemental run-of-river flow would be expected. Even during the lowest inflow year on record (2011), very significant amounts of run-of-river water was applied to irrigation downstream of the lakes.[15]

The proposal for decision reflects the other Parties' insistence that the cost of pipelines and intake barges is an appropriate consideration in rejecting alternatives to the relief LCRA requested. By contrast, there is no willingness to even hear or consider evidence that *this* alternative has a cost, too. The cost of *this* alternative is measured by the impact on the individuals denied water again this year, a lost food supply equivalent to meeting the total calorie needs of a city the size of Austin for a year, and a century-old heritage of rice production and family farming in the lower basin. True enough, the rice producers pay the cost, rather than the firm customers.

Findings of Fact No. 8 should be modified to reflect that under the 2010 WMP, when combined storage is 325,000 acre-feet on January 1, LCRA ceases interruptible supply (assuming no DWDR).

7. CWIC Takes Exception to ALJs Finding of Fact No. 13a. According to the PFD, this finding was proposed by the City of Austin. In too many findings to cite like this one, the PFD simply reflects Austin's narrative, rather than making proper findings of fact that are necessary to a reasoned decision. According to Finding of Fact 13a, there are three primary factors affecting combined storage levels but apparently none of those are firm customer diversions from the lake (247,000 AF in 2011) and none of those are

[15] See, for example, Testimony of Ronald Gertson; Tr. 391:16 – 392:2 .

evaporation (651,985 AF in 2010-2013). (Compare Findings of Fact Nos. 6-7 and 17). Finding of Fact No. 13a is *not* based on the preponderant evidence, contrary to page 21 of the PFD. And, it is not consistent with the rest of the Order. Austin's own evidence is that conservation savings over the past two years "played a key role in preventing combined storage from reaching 600,000 AF." (Finding of Fact 30e). **Finding of Fact No. 13a should be struck.**

8. CWIC Takes Exception to ALJs Finding of Fact No. 13c. The last sentence of this finding of fact includes a gratuitous legal interpretation of the adjudication order and LCRA's certificated water rights. The nature and extent of LCRA's obligations to its firm customers, contractual or otherwise, are not questions in issue in this proceeding, and the proposed interpretation of them also is not relevant. More discussion of this issue follows, regarding proposed Conclusion of Law No 1b.

   Use of terms such as "drive" and "force" are terms of argument, that are not part of a proper finding of fact. Reference to the "1988 Order" has no predicate in the Proposed Order.

   The following phrase should be struck from the last sentence of Finding of Fact No. 13c: "in contravention of the 1988 Order and Certificate of Adjudication Nos. 14-5478 and 14-5482.

9. CWIC Takes Exception to ALJs Finding of Fact No. 30a. The first sentence of this finding is fatally flawed, because the consideration of whether or not particular trigger levels are protective cannot be divorced from consideration of anticipated inflows.

   In the first instance as a matter of logic, both a trigger level of 850,000, and no trigger level, are adequately protective if they result in total cut-off of interruptible supplies.

   A trigger level lower than 850,000 AF also would be quite protective in more favorable inflow conditions and with an expectation of run of river flows downstream that actually diminish the effect of interruptible commitments on combined storage.[16] No witness offered testimony, or at least credible testimony, to the contrary. Without adopting the substance of Finding of Fact No. 30a, and only as an alternative to CWIC's other exceptions, the following modification should be made. **The first sentence of Finding of Fact No. 30a should be changed consistently with the following: "A trigger level of 850,000 AF combined storage, below which there would be no interruptible stored water released to Lakeside, Gulf Coast or Pierce Ranch, is not protective of human health and safety, considering the predicted**

[16] See, generally, Testimony of Ronald Gertson.

continuation of extreme drought in 2014." Findings of Fact 30b and 30c are more consistent with the proposed modification to Finding of Fact 30a than they are with that finding if left unchanged.

10. CWIC Takes Exception to ALJs Finding of Fact No. 30c: This finding is entirely speculative, as there has been no reasonable expectation of combined storage reaching either 1.1 or 1.4 million AF during the term of the order.

    Reference to continued "hydrology" is in error.

    Reference to "emergency levels" is unclear. CWIC understands that some Parties, and perhaps the Judges, refer to 600,000 AF combined storage as an "emergency level" *if LCRA may declare a DWDR.* It is possible that "emergency level" could be misconstrued to refer to combined storage of 600,000 acre-feet under any conditions, or to refer to lake levels at which some customers have difficulty with their lake intakes. Finding of Fact 30 should be clarified as to exactly what "emergency level" references. It is clear from the face of the 2010 WMP and those before it that the LCRA stakeholders and TCEQ previously *approved* the continued supply of interruptible water down to combined storage of 325,000 acre-feet in the absence of DWDR. **Finding of Fact 30 should be clarified as to exactly what "emergency level" references.**

11. CWIC Takes Exception to Findings of Fact Nos. 30f and 30g: The point of these findings is unclear and they also are factually incorrect or misleading. It is not relevant to speculate that *if* combined storage had reached 600,000 AF in 2013 (which it did not) it is unlikely that an emergency order would have been needed in 2014. Does the finding imply that reaching 600,000 AF would have been a benefit?

    It appears that Finding of Fact No. 30g is a partial thought. It also is incorrect, perhaps for that reason, but perhaps not. What the 2010 WMP plan actually says on cited page 4-34 is:

    > "The LCRA Board of Directors will cancel [declaration of DWDR] if *any* of the following conditions are met: (a) the cumulative inflow deficit since the beginning of the drought is less than the envelope curve for cumulative inflow deficits by at least 5% for six consecutive months; or (b) the combined storage in Lakes Buchanan and Travis is greater than 1.4 million acre-feet of water, which is simply the recommended threshold for curtailment of interruptible stored water during a repetition of the drought of record. Prior to declaring a drought worse than the drought of record, LCRA will re-evaluate this threshold

level to determine if a more accurate conservation storage level in lieu of 1.4 million acre-feet can be determined." [Emphasis added.]

Obviously, the inflow condition for cancelling DWDR could be met *before* 1.4 million acre-feet is reached.[17] **Findings of Fact Nos. 30f and 30g should be struck.**

12. CWIC Takes Exception to Findings of Fact Nos. 42 (a) and (b). No party disputed that Austin has made great strides in water conservation in recent years. Its efforts set a good example. However, Findings of Fact Nos. 42 (a) and (b) are unnecessary and even redundant of findings such as 30e. The city's efforts prove that conservation makes a difference in preserving combined storage for essential uses. The efforts of one LCRA customer, however, do not mitigate against whether or not a TCEQ order for emergency relief should be predicated on appropriate conservation efforts by all LCRA customers. **Findings of Facts Nos. 42(a) and (b) should be struck.**

13. CWIC Takes Exception to Findings of Facts No. 42(c) and 48(a). These findings are examples of a number of inflammatory findings that put party argument above facts, and perpetuate a false panic that fears about the drought should be directed at the rice producers. There is no *fact* in Finding No. 42(c). The 2010 WMP simply does *not* allow a total depletion of lake storage "due to" interruptible supply. Provisions for total curtailment in a DWDR is evidence of that. Also, emergency orders already have totally cut-off interruptible irrigation supplies for the past two years, and there has been no suggestion that the supply should not be totally curtailed for a third year. According to ALJs Finding of Fact No. 13, the lakes still are 38% full, slightly higher then they were at the end of last year. **Finding of Fact No. 42 (c) should be struck. For the same reason discussed, the first sentence of Finding of Fact No. 48 should be struck.**

14. CWIC Takes Exception to Findings of Fact Nos. 42 (e), (f), (g), and (h). These findings are unnecessary and the point being made is redundant of other findings. **They should be struck.**

15. CWIC Takes Exception to Conclusion of Law No. 1(b). This conclusion is the ALJ's interpretation of LCRA's obligations to its firm customers under the 1988 Order and the terms of LCRA's adjudicated water rights. The conclusion requires some assumptions about LCRA's firm customer contracts. It also means that the ALJs have

[17] *See also* Testimony of Ronald Gertson that the 2010 Water Management Plan provides a second way for interruptible water to be triggered during a DWDR: inflow deficit being exceeded by 5% or more for six consecutive months (Tr. 385: 1-7).

made an erroneous interpretation. Meeting customer demand 100% of the time could be construed to imply that LCRA has to maintain lake levels to guarantee supply. No reservoir owner could do that.

Unless it is the ALJs' position that emergency relief is *not* necessary because of the way they interpret LCRA's obligations to the firm customers, these matters are not at issue in this proceeding in any event and are not relevant to the merits of LCRA's application. That application is specific to suspending parts of the 2010 WMP based on human health and safety reasons, not because of other reasons. No Party disputed that LCRA is obligated by the terms of the 2010 WMP to supply interruptible uses *now*. That obligation was approved by the TCEQ. If the 2010 WMP is out of sync with LCRA's base water rights that is a matter for consideration during revision of the plan. For purposes of this order, the 2010 WMP must be taken for what it is. **Conclusion of Law No 1(b) should be struck.**

As to the PFD's discussion of that conclusion, the ALJ's link their conclusion of law to CWIC's suggestion that conservation should be a condition of the Order. CWIC objects to the PFD's characterization of its arguments as being to require the firm customers to engage in "extreme conservation measures." CWIC has argued that to make conservation a condition of its emergency orders to totally suspend LCRA's water supply obligation to the downstream irrigators would be consistent with the TCEQ's actions in the Brazos River basin.[18] Regarding what conservation should be required, CWIC proposed the following modifications to the Executive Director's Order:

> Modifications to Finding of Fact No. 42: "The LCRA Board's ~~approved a~~ approval of a no more than once per week watering restriction that would take effect in March 2014 if combined storage is below 1.1 million AF and interruptible stored water has been cut off is a practicable, although partial alternative for addressing risk to human health and safety. ~~LCRA has not requested TCEQ approval of this action and this order does not address such action."~~
>
> A new Conclusion of Law that: "Pursuant to the requirement in § 11.139 that there be no practicable alternatives as a condition of any order, TCEQ has the authority to require conservation in excess of LCRA's drought contingency and firm customer curtailment plans."
>
> A new Ordering Provision that: "LCRA is required to implement the first stage of its firm customer curtailment plan during the term of this Order."

[18] Dr. Kathy Alexander testified generally regarding Chapter 36 conservation rules and also testified that the Executive Director has the authority to require conservation.

Unless *LCRA's* once-a-week watering order is extreme, or it is extreme to implement the first stage of LCRA's *TCEQ-approved* firm curtailment plan (which includes credit for demand reductions already achieved and lets LCRA make variances to address hardship and inequity, which it has done), the ALJ's characterization of CWIC's position is not accurate.[19] CWIC even acknowledged in its arguments that the City of Austin already had achieved most, if not all, of the reductions that would be required to satisfy the first level of LCRA's curtailment plan. Although without searching the transcript, it is doubtful that Austin disputes that.

It is a non-sequitor in the ALJs' consideration that they try to ?? their ?? that ?? cannot be required in development of a water management plan to whether or not convention can be required as a condition of emergency relief after the terms of supply are obligated. It is an extraordinary suspension of the irrigator's rights, after all. It does not go beyond the ?? to assure that firm customers should make reasonable efforts to avoid maintaining suspension in effect.

16. CWIC Takes Exception to the PFD's Explanation of Findings of Fact Nos. 31 (a), (b) and (c). The PFD recites, and gives implicit credence to, an argument that CWIC proposes a trigger level that would make many intakes inoperable. However, what CWIC actually "proposes" is an order that does not include trigger levels at all, but provides that no interruptible water will be supplied. This is an alternative to CWIC's other "proposal" that an 850,000 trigger level would not be reached and also would necessarily result in total curtailment of interruptible supplies. Either way, interruptible supply is cut off and nothing that CWIC proposes has a negative impact on the operability of an intake.[20]

17. CWIC Takes Exception to Finding of Fact No. 49b. This finding is based entirely on an action that is unnecessary during the term of the order. It assumes the supply of irrigation water *in 2015* will require declaration of a DWDR and proposes what is essentially preemptive relief a year in advance. However, an emergency order under § 11.139 is strictly limited to 120 days plus the possibility of 60 additional days. If conditions merit curtailment of irrigation in 2015, LCRA will have an opportunity to

[19] CWIC also suggested modifications to the Executive Director's Order based on its argument that declaring a DWDR was not an imminent risk to human health and safety *because* it triggers the first (20%) phase of LCRA's TCEQ-approved curtailment plan. CWIC argued that in the 2010 WMP, extreme-drought related cut-offs of irrigation water moved in tandem with implementation of the first-phase, 20% conservation. That is proven up by the 2010 WMP itself.

[20] Also, in no circumstance does a trigger level that is not in combination with low inflows cause anything to happen.

seek emergency relief at the appropriate time. **The first sentence of Findings of Fact No. 49b should be struck.**

18. CWIC's Exception to Finding of Fact No. 49c is Discussed Above. **Finding of Fact No. 49c should be struck.**

19. CWIC Takes Exception to the Discussion on PFD, Page 32: On page 32, the ALJs dismiss certain modifications by other parties proposed to state that a 20% reduction in firm customer use would be reasonable. The discussion is unclear, but appears to state that such a reduction would generally require severe restrictions on water use, even inside homes. This statement appears to misunderstand that LCRA's TCEQ-approved curtailment procedures give credit for conservation already achieved and includes a variance process that takes hardship into account.

20. CWIC Takes Exception to ALJs Ordering Provision No. 1. This ordering provision authorizes LCRA to provide no interruptible stored water if the lake level on March 1 is below 1.4 million acre-feet. CWIC's objections to basing ordering provisions on impossible hypotheticals won't be repeated here, except to iterate that hypothetical triggers are better left to the water management revision process. **Ordering Provision No. 1a should be struck and replaced as follows: LCRA may deviate from the 2010 WMP as it pertains to the determination of interruptible supply for 2014 and instead provide no interruptible stored water based on the combined storage of Lake Buchanan on February 1, 2014 and the expectation that the lakes will not recover significantly before March 1, 2014, at 11:59 p.m.**

    This ordering provision also includes a total, annual cap on irrigation water. When combined storage is anywhere above 1.4 million acre-feet (and all the way to brim full) LCRA would be authorized to provide no more than 172,000 AF of interruptible stored water within LCRA's Gulf Coast, and Lakeside Divisions and Pierce Ranch. Such an unconditional cap on supply is not necessary to prevent imminent risk to human health and safety under the authority of a § 11.139 emergency order. It is a plain abandonment of the 2010 WMP, which includes no such cap.

    Mr. Gertson's testimony also explained that, even for purposes of pending water management plan revision in which CWIC also disputes adding a cap, the number is incorrectly calculated. No one challenged that fact.[21] It is not CWIC's burden to disprove the cap, it is LCRA's burden to prove it. In the face of uncontroverted evidence regarding the inaccuracy of the cap, and the record as a whole, LCRA has not

[21] See Testimony of Ronald Gerston.

met its burden of proof to support ordering an unconditional cap on interruptible supplies.

The PFD does not contain adequate findings to support this part of Ordering Provision 1, and also the record has insufficient evidence to support such findings. To the extent that the ALJs continue to interpret the meaning of the adjudication within the context of this hearing, they would find that an unconditional cap would be explicitly contrary to it. **Ordering Provision No. 1 b should be struck.**

21. CWIC Takes Exception to ALJs Ordering Provision No. 4. It is legally inappropriate to include an automatic renewal provision in the order. Water Code § 11.139 is explicit in subsection (l) that an emergency authorization does not vest any continuing authority of right of use in the grantee. Ordering Provision No. 4 itself provides that the opportunity to renew happens *after* termination. The agency should not treat a renewal like an extension. To do so makes the renewal provision meaningless in the statute. The term of an Order would simply be up to 180 days. In this case, particularly, the merits of emergency curtailment depend on forecasted predictions about the extent to which extreme drought continues, and automatic renewal is not appropriate. **Automatic renewal should not be authorized.**

PRAYER

WHEREFORE, upon consideration of this Exceptions to ALJ's Proposal for Decision, CWIC prays that the Commission:

1. Modify the Executive Director's Order consistently with CWIC's Exception No. 3, to grant LCRA the authority to provide no interruptible water during the term of the Order, considering actual conditions rather than projected trigger levels;

2. In the alternative, to modify the ALJs' Proposed Order consistently with CWIC's Exception No. 3, specifically including modifications to grant LCRA authority to provide no interruptible stored water based on prevailing conditions rather than projected trigger levels; or,

3. In the alternative, modify the ALJs' Proposed Order consistently with CWIC's Exceptions Nos. 1-2 and 4-21.

Respectfully submitted,

BOOTH, AHRENS & WERKENTHIN, P.C.

By: _____

Carolyn Ahrens, Of Counsel
State Bar No. 00942030

Michael J. Booth
State Bar No. 02648500
515 Congress Avenue, Suite 1515
Austin, Texas 78701-3503
(512) 472-3263
(512) 473-2609 Fax

ATTORNEYS FOR COLORADO WATER ISSUES COMMITTEE

CERTIFICATE OF SERVICE

I hereby certify with my signature below that a true and complete copy of CWIC's Exceptions to Proposal for Decision was served on the following parties of record via e-mail on this the 24th day of February 2014.

Carolyn Ahrens

SERVICE LIST

Party	Representative
Lower Colorado River Authority	Lyn Clancy Greg Graml Lower Colorado River Authority P.O. Box 220 H429 Austin, TX 78703 (512) 473-3378 (PH) (512) 473-4010 (FAX) lyn.clancy@lcra.org greg.graml@lcra.org
Executive Directory of the TCEQ	Robin Smith TCEQ Litigation Division P.O. Box 13087, MC 173 Austin, TX 78711 (512) 239-0463 (PH)

	(512) 239-3434 (FAX) rsmith@tceq.state.tx.us
Office of Public Interest Counsel	Vic McWherter Texas Commission on Environmental Quality Office of Public Interest Counsel MC-175, P.O. BOX 13087 Austin, TX 78711-3087 (512) 239-0579 (PH) (512) 239-6377 (FAX) vmcwhert@tceq.state.tx.us
City of Austin	Mary K. Sahs Ross Crow City of Austin P.O. Box 1088 Austin, TX 78767-1546 marysahs@sahslaw.com Ross.Crow@austintexas.gov
Central Texas Water Coalition	Cynthia C. Smiley Shana Horton SMILEY LAW FIRM 6000 Shepherd Mountain Cove, #2107 Austin, TX 78730 (512) 394-7121 (PH) (512) 394-7145 (FAX) cindy@smileylawfirm.com shana@smileylawfirm.com Frank Cooley Austin, TX 78701 (818) 404-2541 (CELL) frankjcooleyesq@gmail.com
Texas Parks & Wildlife Department	Colette Barron Bradsby Texas Parks & Wildlife Department 4200 Smith School Road Austin, TX 78744 (512) 389-8899 (PH) (512) 389-4482 (FAX) Colette.Barron@tpwd.texas.gov
National Wildlife Federation	Myron J. Hess National Wildlife Federation 44 East Avenue, Suite 200 Austin, TX 78701 (512) 476-9805 (PH) (512) 476-9810 (FAX)

	hess@nwf.org
Lehner/Lewis Interests & Garwood Irrigation	Molly Cagle BAKER BOTTS, LLP 1500 San Jacinto Center 98 San Jacinto BLVS. Austin, TX 78701 (512) 322-2535 (PH) (512) 322-2501 (FAX) Molly.Cagle@bakerbotts.com
Clive Runnels D/B/A AP Ranch	Mary W. Carter BLACKBURN CARTER, PC 4709 Austin Street Houston, TX 77004 (713) 524-1012 (PH) (713) 524-5165 (FAX) mcarter@blackburncarter.com
Highland Lakes Firm Water Customer Cooperative	Patricia Erlinger Carls Carla Garcia Connolly CARLS, MCCDONALD & DARYMPLE, LLP Barton Oaks Plaza 2 901 South Mopac Expressway, Suite 500 Austin, TX 78746 (512) 472-4845 (PH) (512) 472-8403 (FAX) tcarls@cmcdlaw.com cconnolly@cmcdlaw.com